No. 17-742

IN THE

Supreme Court of the United States

MARY ANNE SAUSE,

Petitioner,

v.

TIMOTHY J. BAUER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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Question Presented

Officers were investigating a noise complaint in the home of Petitioner Mary Anne Sause. Over 20 minutes into the encounter, Sause asked Officer Lindsey to pray; Lindsey said yes and Sause knelt and began praying. Officer Stevens entered the room and, after a time, told Sause get up and to stop praying. Sause did so. The officers gave Sause two citations for interference and disorderly conduct.

The question presented is:

Whether the Court of Appeals correctly held Respondents were entitled to qualified immunity because the law was not so clearly defined at the time of the incident that it would be clear to every reasonable law enforcement officer that they would violate the First Amendment by instructing the subject of an investigatory detention to stop praying while the investigation was ongoing.

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Introduction

Respondents, Officers Jason Lindsey and Lee Stevens ("the Officers"), responded to a noise complaint involving Petitioner Mary Anne Sause and her radio. Sause initially refused to answer the door when the officers knocked. When the officers returned a second time, Sause answered the door and presented a booklet with the Constitution and Bill of Rights. Over 20 minutes into the encounter, when Officer Stevens had left the home for a time, Sause asked Officer Lindsey to pray; Lindsey said yes and Sause knelt and began praying. Officer Stevens returned and, after a time, told Sause get up and to stop praying. Sause did so. Sause was thereafter given tickets for interference with law enforcement and disorderly conduct (the validity of which she does not challenge).

Sause sued Officers Lindsey and Stevens under 42 U.S.C. § 1983, alleging they violated her rights under the First Amendment. The district court granted the Officers' motion to dismiss for failure to state a claim because the instruction to Sause to stop praying did not violate her rights under the First Amendment. The Court of Appeals for the Tenth Circuit affirmed, but on different grounds. The Tenth Circuit assumed, without deciding, that the Officers' conduct violated Sause's rights under the First Amendment. The Court of Appeals held the Officers were nonetheless entitled to qualified immunity because the law was not clearly established that their alleged conduct violated the law.

The Tenth Circuit's decision is correct—even accepting Sause's allegations of interspersed harassment as true. Even if we were to assume the Officer's

conduct—telling Sause to stop praying while they conducted their investigation into the noise complaint—violated the constitution, the law was not "clearly established" at the time of the events in November 2013.

Petitioner asks this Court for an advisory opinion stating what the law would be if the circumstances were different than those presented by her complaint, to-wit: an officer that insists that a citizen to stop praying during a police-citizen encounter, in the absence of any legitimate justification, per se violates the First Amendment.

This Court should deny the Petition.

Statement of the Case

A. Officers Lindsey and Stevens investigate a noise complaint and issue two citations to Sause.

Petitioner's appendices include the decisions of the district court and Court of Appeals as well as the Judgment of the Court of Appeals. App. 1a, 20, 35a. The appendices omit, however, Sause's complaint. It is the complaint, of course, upon which upon which both the district court and Court of Appeals based their decisions regarding respondent's motion to dismiss for failure to state a claim. App. 3a, 21a.

On November 22, 2013, Officers Stevens and Lindsey arrived at Sause's apartment in response to a noise complaint. App. 3a, 21a.[1] After she initially refused to answer the door, Sause let both officers into her home.

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[1] The Petition states Sause had been listening to a talk-radio show. Pet. 5. The complaint does say the noise complaint was related to her radio, but it does not state to what she was listening.

App. 3a. Sause picked up a booklet containing the Constitution and Bill of Rights which she keeps near her front door. *Id.* 21a–22a. Sause alleged Officer Lindsey mocked her and Officer Stevens left the apartment shortly after. App. 22a. Officer Lindsey and Sause's friend went into Sause's bedroom to kennel a dog and Officer Lindsey refused Sause entry into her own bedroom while he spoke with the friend. App. 22a.

After 20 minutes or more, while Stevens was outside the home, Lindsey informed Sause that she "was going to jail," although he "d[idn't] know [why] yet." App. 3a. Sause then asked Lindsey if she could pray, he said, "Yes," and she began praying. App. 3a–4a.

Sometime later, Stevens came back inside and asked what Sause was doing. App. 4a. Lindsey laughed and told Stevens "in a mocking tone" that Sause was praying, whereupon Stevens told Sause to get up and stop praying. App. 4a. Sause alleges the officers then "started 'looking through [their] booklet' for something to charge Sause with." App 4a. The officers ultimately "cited Sause for disorderly conduct and interfering with law enforcement." App. 4a

The validity of the citations to Sause has never been disputed in this case. It is noteworthy, however, that Sause did not press a claim under the Fourth Amendment for malicious prosecution.[2] Moreover, she

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[2] Sause did press a Fourth Amendment claim against Officer Lindsey based upon his refusal to let her enter her bedroom while he was in her apartment. App. 21a, 30a. The district court dismissed the claim holding, "refusal to allow Plaintiff to enter her bedroom while she was being questioned by the officers does not constitute a violation of her Fourth Amendment rights." *Id.* 30a.

did not claim that the Officers lacked reasonable suspicion for their encounter with her in the first place nor did she claim they lacked probable cause to issue the tickets.

B. Procedural background.

Sause filed her complaint *pro se* on November 20, 2015, alleging a variety of claims against a number of defendants.[3] All defendants moved to dismiss all claims. The district court granted the motion in its entirety. App. 34a. The district court's opinion made clear that Sause's First Amendment claim was brought against Stevens, but was not brought against Lindsey. 28a-31a.

On appeal to the Tenth Circuit Sause, represented by counsel, Sause appealed only the dismissal of the First Amendment claim. App. 1a–2a. Sause did not challenge (1) the district court's construction of her Fourth Amendment claim or (2) the dismissal of her Fourth Amendment claim. App. 19a (Tymkovich, C.J., concurring). Rather, she argued on appeal that her First Amendment claim was brought against both Stevens and Lindsey, App. 6a, notwithstanding that Lindsey told Sause she could pray and that she in fact did pray with Lindsey's permission.

The Tenth Circuit assumed, without deciding, that Sause could show that defendants plausibly violated her constitutional rights. App. 6a–7a. This assumption, made out of convenience, permitted the Tenth Circuit to first analyze whether the right at issue was clearly defined. *Id.* The court noted it had discretion to

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[3] Sause's *pro se* complaint is not included in Petitioner's appendices.

decide discretion to address the second prong first "in light of the circumstances in the particular case at hand." App. 6a (quoting *Pearson v. Callahan,* 555 U.S. 223, 236 (2009)).

The Tenth Circuit rejected Sause's assertion that, "[t]he right to be free from official retaliation for exercising one's First Amendment rights [was] also clearly established," and observed:

> Here, Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here—i.e., a scenario in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation.

App. 8a.

The Tenth Circuit also held this was not a case where the defendants' conduct was so obviously unlawful that the constitutional question was beyond debate so as to excuse the need for a case on point or the weight of authority. App. 9a, 15a. Accordingly, the Tenth Circuit unanimously concluded that the officers were entitled to qualified immunity. App. 15a.

Chief Judge Tymkovich wrote a brief concurring opinion to emphasize that Sause's claims fit more appropriately in the Fourth Amendment context. App. 17a.

Reasons to Deny Certiorari

This Court should deny the Petition for a writ of certiorari because the question framed in the Petition is not supported by the record, the Tenth Circuit's decision was correct, and this case is not a suitable vehicle for this Court to decide what limitations the Free Exercise clause may impose upon legitimate law enforcement activities.

A. The question presented in the Petition ignores the facts alleged in Sause's complaint and the premise to the question presented is not supported by the record.

The arguments in the Petition ignore the facts pled on the face of Sause's complaint. In fact, the Petition omits the complaint entirely. The Petition presents selective and paraphrased recitations as presented by the Tenth Circuit's opinion. Pet. 5–9.[4] The premise to the question presented in the Petition is without support in the record.

Sause poses the question of whether a citizen's rights under the First Amendment are violated when "forc[ed] to stop praying *absent any legitimate justification whatsoever*." Pet. 3. The face of the complaint shows the Officers were present for, and were pursuing, a legitimate law enforcement purpose. They were responding to and investigating a noise complaint. The Officers continued to pursue legitimate law enforcement purposes after asking her to stop praying, giving

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[4] The Petition does not cite or rely on the statement of facts set forth the by the district court, *see* App. 21a – 24a, which still paraphrases the complaint, but more closely tracks its language.

her two tickets.[5] The Petition essentially contradicts Sause's own complaint when it asserts the officers lacked "any legitimate justification" when asking her to stop praying.[6] Pet. 3.

It becomes apparent that the Petition is highly selective in the facts presented because the arguments therein make sense only if the instruction to stop praying is divorced from the circumstances of the investigation. Even then, the Petition makes sense only if the right to pray free from governmental interference is analyzed at the highest, most generalized level. But this Court has repeatedly warned circuit courts against defining the right at a general level and has summarily reversed the courts that have done so. *See, e.g., Mullenix v. Luna*, 136 S. Ct. 305, 311 (2015); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).

Sause twice claims the two tickets she received were unrelated to a noise complaint, which was the purpose of the investigation. Pet. 7, 30. First, it is not uncommon for a police encounter initiated for one reason to result in an enforcement action for another, perhaps unrelated reason. *See, e.g., Brigham City, Utah*

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[5] The Petition states the Officers also instructed Sause "to turn the radio down which had been playing throughout the entire interaction" as they went out the door. Pet. 7. This fact does not appear in Sause's complaint, but demonstrates the Officers pursued legitimate law enforcement purposes while on the premises, addressing a noise complaint, and left the premises when that purpose had been resolved.

[6] The Petition is also inconsistent with Sause's election to abandon any claim that her encounter with respondents was in any way unreasonable under the Fourth Amendment. App. 19a, 21a, 30a.

v. Stuart, 547 U.S. 398, 401, 406 (2006) (officers respond to noise complaint, make warrantless entry to home after seeing fight inside the home causing injury to an adult occupant; resulting enforcement action were charges for contributing to the delinquency of a minor, disorderly conduct, and intoxication); *and see Texas v. Brown*, 460 U.S. 730, 733–34 (1983) (license checkpoint resulting in heroin possession charges based on plain view doctrine). Second, the citations for interference and disorderly conduct are not "unrelated" to the noise complaint. The interference charge arose from Sause's refusal to answer the door in the first place and, under Kansas statutes, disorderly conduct is an appropriate charge for a noise complaint. *See* Kan. Stat. Ann. § 21-6203(A)(3).[7]

The Officers' conduct was *not* absent any legitimate justification whatsoever. The Petition should be denied.

B. An instruction to "stop praying" during a legitimate investigatory detention does not violate any clearly established constitutional right of which all reasonable officials would have known. The Tenth Circuit correctly held that, even assuming such conduct violates the First Amendment, the law is not clearly established.

"[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S.

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[7] Kan. Stat. Ann. § 21-6203(a)(3) defines disorderly conduct to include an act "the person knows or should know will alarm, anger or disturb others" to include "engaging in noisy conduct tending reasonably to arouse alarm, anger or resentment in others."

730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Government officials can be put on notice by (1) a "case directly on point" holding the conduct at issue violates the law; or (2) "existing precedent must have placed the statutory or constitutional question beyond debate." *See al-Kidd*, 563 U.S. at 741 (the question must be "beyond debate"); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) ("some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing"). Neither circumstance exists here.

1. **Petitioner concedes there is no caselaw involving sufficiently similar circumstances that squarely governs here.**

White v. Pauly explicitly instructs that, while a case directly on point is not required to defeat qualified immunity, for a right to be clearly established "'existing precedent must have placed the statutory or constitutional question beyond debate.'" 137 S. Ct. 548, 551 (2017) (quoting *Mullenix*, 136 S. Ct. at 308). The Tenth Circuit adhered to "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *Id.* at 552 (quoting *al-Kidd*, 563 U.S. at 742). Further "the clearly established law

must be 'particularized' to the facts of the case." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Tenth Circuit observed, "Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a. The Tenth Circuit understood the dispositive question for qualified immunity "is whether the violative nature of [the defendants'] *particular conduct* is clearly established" App. 7a (quoting *Mullenix*, 136 S. Ct. at 308) (internal quotation marks and citation omitted). Given that understanding, the court set forth the particularized facts in question to be a scenario

> in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation.

App. 8a.

Contrary to the assertion in the Petition, the Tenth Circuit did not require an identical case to show that such a right was clearly defined. Pet. 11–12. Rather, the court noted the need to cite "a case or cases that make clear the violative nature of [the defendants'] *particular* conduct" to meet the clearly established prong. App. 10a (quoting *Mullinex*, 136 S. Ct. at 310) (internal quotation marks and citation omitted). Qualified immunity is warranted where no precedent

squarely governs the facts at hand. *See Mullenix*, 136 S. Ct. at 310.

It is beyond question that, on November 22, 2013, there was no case or authority that holds the First Amendment is violated by an instruction to "stop praying" (or stop engaging in religiously-motivated conduct) during the course of a legitimate police investigatory encounter. Petition cites no such case or authority. There is none, and the Tenth Circuit said as much, "because Sause fails to identify—and our independent research fails to yield—any such authority, we conclude that the law isn't clearly established." App. 10a.

The Petition does not suggest otherwise. Sause instead poses an alternate set of facts by asserting the investigation was no longer ongoing. She argues the officers made certain remarks or took certain actions while they were in her apartment, and that those remarks or actions transformed the investigation into nothing more than harassment. Pet. 30. This disregards the facts pleaded on the face of the complaint which were discussed by the courts below and which show the officers were conducting an ongoing investigation. The investigation, which started *before* the request that she stop praying, continued *after* the request and concluded with the issuance of two tickets.

Even accepting as true that, during the investigation, the respondents made insensitive and boorish remarks and took actions unrelated to the investigation, there is still no violation of clearly established law. The "right" (as articulated by Sause) "to pray in the privacy of one's home free from governmental interference in the absence of a legitimate law enforcement interest"

is not violated by rude remarks or conduct during an ongoing, legitimate investigation.

2. The decision below is wholly consistent with *Hope v. Pelzer*. The Tenth Circuit did not require a case directly on point; rather, the court correctly held existing precedent does not place the constitutional right claimed by the Petitioner beyond debate.

The Petition contends Sause overcomes qualified immunity by asserting the instruction to stop praying during the investigation was so egregious as to be "clearly unlawful." Pet. 4, 13–14 (citing *Hope v. Pelzer*, 536 U.S. at 739, 741). By its nature, this "obviously unlawful" exception does not lend itself to a bright-line rule. But this Court made clear the exception applies to only the most egregious or outrageous conduct which existing law clearly declares unlawful. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-79 (2009) (discussing rule while granting qualified immunity for strip search of middle school student); *see also Camreta v. Greene*, 563 U.S. 692, 728 (2011) ("That rule permits clearly established violations to be found when extreme though unheard-of actions violate the Constitution.") (Kennedy, J., dissenting). Asking the subject of a legitimate investigatory encounter to stop praying for the few minutes until the officers concluded their investigation is not an example of "extreme though unheard-of actions."

i. The Tenth Circuit squarely addressed, and correctly rejected, the argument advanced by the Petition.

Sause argues the instruction to "get up" and "stop praying" is an example of extreme though unheard-of

actions, and argues the decision below conflicts with *Hope v. Pelzer*. Sause goes so far as to claim that the Tenth Circuit did not "grapple with [*Hope*'s] admonition that qualified immunity can be defeated 'even in novel factual circumstances.'" Pet. 12. In *Hope*, this Court held it was clearly established that handcuffing an inmate to a hitching post—once for approximately seven hours and for purely punitive reasons—clearly violated the Eighth Amendment. 536 U.S. at 742. Sause cites this case for the premise that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741.[8] The Tenth Circuit did not disregard this aspect of qualified immunity jurisprudence; rather, it expressly addressed it with respect to Sause's claim.

The Tenth Circuit acknowledged a plaintiff may meet her burden of showing the law to be "clearly established" by citing a Supreme Court or Tenth Circuit decision on point, or showing that the weight of authority from other circuits clearly establishes the right. App. 8a. The Tenth Circuit said, however, these are not the only options to carry the burden of showing clearly established law. App. 9a. The Tenth Circuit ob-

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[8] This Court's decision in *Hope*, did not turn on the question of "novel factual circumstances." 536 U.S. at 741. Rather, the Court held the hitching post practices employed in an Alabama prison violated the Eighth Amendment (1) in light of binding circuit precedent, and (2) as illustrated by a series of Department of Justice advisories to Alabama that its actual practice of using the hitching post as punishment violated the Eighth Amendment. *Id.* at 742–45 (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), noting that pre-1981 decisions by the Fifth Circuit were binding in the Eleventh Circuit).

served that "general statements of the law are not inherently incapable of giving fair and clear warning to officers." App. 9a (internal citations and quotes omitted). And it further "recognize[d] that Sause need not identify 'a case *directly* on point' to show that the law is clearly established." App. 9a (quoting *al-Kidd*, 563 U.S. at 741). Finally, the Tenth Circuit acknowledged that "sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." App. 9a (quoting *Browder v. City of Albuquerque*, 787 F.3d at 1082).

In sum, the Tenth Circuit fully addressed the very argument made in the Petition, concluding "while the conduct alleged in this case may be obviously unprofessional, we can't say that it's 'obviously unlawful.'" App. 9a. The court explained:

> [I]t certainly wouldn't be obvious to a reasonable officer that, in the midst of a legitimate investigation, the First Amendment would prohibit him or her from ordering the subject of that investigation to stand up and direct his or her attention to the officer—even if the subject of the investigation is involved in religiously-motivated conduct at the time, and even if what the officers say or do immediately after issuing that command does nothing to further their investigation.

App. 9a. Finally, the Tenth Circuit found this is not "a case where the defendants' conduct is so obviously egregious ... in light of prevailing constitutional principles that less specificity is required from prior case law to clearly establish the violation." App. 9a (internal quotations and citations omitted).

Petitioner asserts the "failure" to cite *Hope* shows a disregard by the Tenth Circuit of this aspect of this Court's qualified immunity jurisprudence. Petitioner is plainly wrong and ignores the careful attention given by the Tenth Circuit to the selfsame argument. The Tenth Circuit correctly considered and rejected Petitioner's argument.

ii. Petitioner frames the constitutional question at such a high level of generality that no meaningful rule can be discerned.

The Petition repeatedly quotes an accurate, but incredibly broad, discussion of the right to be free of government suppression of religious belief or practice.[9] Time and again this Court has warned against analyzing for clearly established law at a high level of generality. *Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established") (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)); and *al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts ... not to define clearly established law at a high level of generality.").

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[9] The Petition repeatedly cites and quotes from *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). Pet. 3, 17, 18, 19, 20, 22, 23, 25 n.10. The Petition sets forth the following quote from *Lukumi*, 508 U.S. at 523, no fewer than four times:

> The principle that government may not ... suppress religious belief or practice is so well understood that few violations are recorded in our opinions.

Pet. 3, 17, 18, 20, and quotes a fragment of that citation twice more. *Id.* 19, 23.

In fact, this Court summarily reversed appellate courts for doing so. For example, this Court summarily reversed the Ninth Circuit's denial of qualified immunity where the conduct at issue was shooting a fleeing suspect in the back. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). There, the Ninth Circuit based its decision on *Graham v. Connor*, 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1 (1985). *Id.* at 199. In *Brosseau*, this Court said *Graham* and *Garner* were "cast at a high level of generality" and therefore did not suffice to show that the defendant's action violated a clearly established Fourth Amendment right "in this more 'particularized' sense." *Id.* at 199–200 (quoting *Saucier v. Katz*, 533 U.S. at 202).

This Court also, in *Mullenix v. Luna*, summarily reversed the Fifth Circuit for denying an officer qualified immunity in another case involving the fatal shooting of a fleeing suspect. 136 S. Ct. at 312. This Court again noted the error of "defin[ing] the qualified immunity inquiry at a high level of generality . . . and then fail[ing] to consider that question in 'the specific context of the case.'" *Id.* at 311 (quoting *Brosseau*, 543 U.S. at 198). This Court has held repeatedly that, to defeat qualified immunity, the constitutional right claimed by the petitioner has to be "beyond debate." *See, e.g., Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (quoting *al-Kidd*, 563 U.S. at 741).

Sause cites *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), for the accurate but over-generalized premise that government may not suppress religious belief or practice. Pet. 3, 18–19, 22-23. This presents the issue of religious freedom at the absolute highest level of generality and no government official could read *Lukumi*, and conclude "beyond

debate" that the Officers' conduct herein violated the First Amendment. *See al-Kidd*, 563 U.S. at 741.

Lukumi addressed a challenge to a city ordinance dealing with the ritual slaughter of animals. Only the most general statement of First Amendment rights in that case could be said to apply to Sause's claim, and then only in the abstract. Nothing in *Lukumi* can be read to even loosely relate to the boundaries of law enforcement conduct during a legitimate investigation, let alone the particularized conduct set forth in Sause's complaint. The Petition goes on to cite a number of First Amendment cases, but its description of those cases makes clear they do not involve conduct similar to the particularized conduct that of which Sause complains in her complaint. Pet. 20–27. A case-by-case analysis is unhelpful because the Petition suggests that *any* limitation or impingement on the free exercise of religion violates the First Amendment.

iii. This Court's precedent shows a variety of legitimate government interests that may impinge upon First Amendment rights without violating the First Amendment.

Contrary to the Petition's central premise, this Court held in a variety of circumstances that a legitimate government interest may impinge upon rights under the First Amendment yet pass constitutional muster. For instance, this Court held that the Free Exercise Clause does not exempt religious persons from the dictates of neutral laws of general applicability. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 878–79 (1990). Similarly, "our cases establish the general proposition that a law that

is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531.

Far from the bright-line rule the Petition suggests be drawn that forbids *any* burden on religious exercise, this Court applies a balancing test to prevent a "substantial burden" that lacks sufficient justification. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (First Amendment right to religious freedom while incarcerated is not violated by restrictions on the exercise of that right in order to advance valid penological objectives).

"[A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). And "a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, 'if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on ... First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Accord Young v. Am. Mini Theatres*,

Inc., 427 U.S. 50, 79–80 (1976) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

Finally, the Petition does not cite, and cannot be squared with, this Court's decision in *Reichle v. Howards*, 566 U.S. 658 (2012). That case noted "[t]his Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause ... ." *Id.* at 664–65. *Reichle* tells us police-citizen encounters that are reasonable under the Fourth Amendment do not violate the First Amendment.

The district court's analysis of Sause's Free Exercise claim readily addresses, and disposes of, the Petition's generalized assertion.

> Officers [Stevens] and Lindsey were investigating a noise complaint in Plaintiff's building, which led them to her apartment. While Officer [Stevens]'s instruction to Plaintiff to stop praying may have offended her, it does not constitute a burden on her ability to exercise her religion. Plaintiff fails to provide any allegations that would suggest Officer [Stevens]'s actions coerced her into conduct contrary to her religious beliefs, or that he otherwise prevented her from practicing her religion. Rather, he merely instructed her to stop praying while the officers were in the middle of talking to her about a noise complaint they had received.

App. 29a–30a. The imposition upon Sause was brief and resulted directly from a legitimate and ongoing investigation of a noise complaint. The government's interest in investigating crimes and enforcing the criminal laws outweigh an incidental burden on First

Amendment rights. *See, Branzburg v. Hayes*, 408 U.S. 665, 683–95 (1972).

The premise of the Petition is unworkable and fails to apprehend the effect it would have on day-to-day law enforcement. The rule posed by Sause would require law enforcement to cease any enforcement or investigatory activity any time a citizen chose to pray in the midst of that activity. For instance, could the subject of a traffic stop for suspected DUI delay the investigation indefinitely by starting an endless prayer? This Court's precedents clearly show even severe, but brief intrusions upon personal liberty and security are constitutionally permissible.

This Court observed in *Terry v. Ohio* that a stop and frisk is a brief but severe "intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience," it is nonetheless constitutionally permissible under certain circumstances. 392 U.S. 1, 24–25, 27–28 (1968). In *Michigan v. Long*, this Court also observed there is no ready test to determine the reasonableness of a police-citizen encounter other than by balancing the need for governmental intrusion against the invasion upon personal liberties entailed by the encounter. *Michigan v. Long*, 463 U.S. 1032, 1046 (1983) (internal citations and quotation omitted). Such intrusions upon personal liberties are reasonable when weighed against "the legitimate interest in 'crime prevention and detection.'" *Id.* at 1047 (quoting *Terry*, 392 U.S. at 22).

Government intrusions that briefly impinge on personal liberties are subject to a balancing of a variety of competing interests—especially in the context of the First and Fourth Amendments. Thus, the general

"principle that government may not ... suppress religious belief or practice," *Lukumi*, 508 U.S. at 523, does not establish that the respondents' conduct alleged in Sause's complaint was so obviously unlawful that the constitutional question was beyond debate. Accordingly, the Tenth Circuit correctly held respondents are entitled to qualified immunity.

Conclusion

The Court should deny the petition.

Respectfully submitted,

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